No. 5748

In the United States Circuit Court of Appeals for the Ninth Circuit

LOUIS BRANDAW, GUARDIAN OF THE ESTATE AND PERSON OF CHARLES E. BRANDAW, AN INCOMPETENT, PLAINTIFF IN ERROR,

v.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

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To the Honorable The United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Defendant in Error by George Neuner, United States Attorney for the District of Oregon, and petitions the Court to grant it a rehearing in the above-entitled cause, upon the grounds hereinafter stated, which, notwithstanding the seeming directness of their presentation, counsel begs the Court to accept as submitted with the highest deference and respect.

The facts briefly stated are: Charles E. Brandaw enlisted in the Army August 25, 1918, and was discharged October 21, 1918. On August 28, 1918, Brandaw applied for and was granted $10,000 war-risk term insurance on which premiums were paid through the month of October, 1918. In the petition filed on or about November, 1927, it was alleged that the insured became permanently and totally disabled on October 21, 1918, on account of epilepsy. The defendant admitted the granting of the insurance but denied that Brandaw was permanently and totally disabled on October 21, 1918. After trial the case was submitted to the jury who returned a verdict finding generally for the defendant and against the plaintiff, on which judgment for the defendant and against the plaintiff was entered. (R. 14, 15.)

The plaintiff's only Assignment of Error is the failure of the Trial Court to give a requested instruction as follows:

> You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted, and enrolled for service, *except as to defects, disorders, and infirmi-*

> *ties made of record in any manner by proper authorities of the United States at the time or prior to inception of active service.* The law further provides that any ex-service man, *who is shown to have had* prior to January 1, 1925, a neuropsychiatric disease, which developed a 10% degree of disability, shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from neuropsychiatric disease prior to January 1, 1925, and developed more than a 10% degree of disability from the date of his discharge and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence. (Italics ours.) (R. 19.)

The Bill of Exceptions (R. 16, 17, 18) discloses that one Oscar Pfahl, testifying for the plaintiff, was questioned on direct examination as to Brandaw's capacity and ability to work before he entered military service, and that all of his answers to the questions propounded were in effect that Brandaw could and did work. On cross examination the witness Pfahl was asked:

> Do you know whether or not he had any of these spells or seizures prior to entering the service?

To this question counsel for plaintiff objected, and, after being overruled, the witness testified:

> *That he had never heard of or seen any seizures which the plaintiff had prior to his entrance into the service.* (R. 17, 18.)

After the jury had retired the plaintiff's attorney asked for an exception to the refusal of the Court to give the requested instruction about which this appeal revolves (R. 23) and was apprised by the Court that it was *not* the practice *not* to make exceptions in the presence of the jury in that Court, or, stated in the affirmative, that it was the practice that exceptions must be made before the jury retired.

The Bill of Exceptions goes no further into the testimony.

CONTENTIONS OF DEFENDANT IN ERROR UPON REHEARING

The contentions of the defendant in error, if a rehearing is granted, will be as herein set forth, and the reasons for granting a rehearing will be elaborated in the statement of the argument:

1. The requested instruction was immaterial.
2. The plaintiff did not timely except to the Court's refusal to give the requested instruction.

STATEMENT OF ARGUMENT

I

The only testimony contained in the Bill of Exceptions in this Record as to Brandaw's physical condition at the time he enlisted in the service is

that he was in good physical condition, was able to, and did work. Further, it was shown by defendant's exhibit No. 2 that Brandaw when enlisted was, so far as the record of examination shows, in sound physical condition. That the Trial Court considered that there was no evidence to the contrary is the only inference which may be drawn from that part of the Court's charge, as follows:

> I think it is fair to assume in the absence of evidence to the contrary that he was at that time (enlistment) in good, substantial health, * * * and when he was inducted into the Army it is fair to assume that he was found to be in that condition. (R. 21, 22.)

Assuming for the moment that the plaintiff was entitled to the requested instruction about which he complains, it is submitted that that instruction was fully given in substance as above quoted. Further, since Brandaw to recover must have shown that permanent and total disability ensued at some time subsequent to the date of application, August 28, 1918, and before the expiration of the grace period, November 30, 1918, it is difficult to perceive the probative value of plaintiff's requested instruction. The request for instruction might as well have dated back to the birth of Brandaw with the request that he then be presumed to have been physically sound, for even though he was presumed sound at date of enlistment, the evidence before the jury which prompted them to return a general verdict

for the defendant may well have been, first, that Brandaw became permanently and totally disabled at some time after enlistment and before application for insurance; or, second, that he was not permanently and totally disabled either before enlistment, after enlistment, or after application and within the life of the policy. The record is, of course, silent as to the basis on which the jury's verdict is founded.

This Court said, through Judge Dietrich, in the case of *United States* v. *Per Eliasson,* 20 Fed. (2d) 821:

> The question being, did plaintiff become "totally and permanently disabled" prior to August 1, 1919, our concern is with the effects rather than with the germinal origin of any disease with which he may have been afflicted. It would therefore seem to be immaterial that he acquired the germ during the term of the insurance where, as here, it conclusively appears that if so acquired it did not operate seriously to impair his physical or mental capacity until three years after the insurance expired. But if we assume that the instruction upon the point might properly have been withheld, I am unable to see how the giving of it could have been prejudical. The court clearly advised the jury that only in case they were convinced by the evidence of plaintiff's total and permanent disability during the insur-

> ance term would they be warranted in finding for him; and this view was emphasized by repetition. Attention was thus effectively drawn to the controlling issue of plaintiff's actual physical condition at the time the insurance terminated, and upon that issue I agree that under the accepted definitions of "total" and "permanent" disability as set forth in the instructions, the case was one for the jury.

Likewise, in the present case the Trial Court in his instructions made plain that the issue was whether or not Brandaw became permanently and totally disabled within the life of the contract as follows:

> * * * On his behalf it is alleged and claimed that while this policy was in force; that is, some time prior to November 30, 1918, he became permanently and totally disabled, and the sole question for you to determine is, under this evidence, whether, prior to that date, he did become permanently and totally disabled. * * * If Brandaw was totally and permanently disabled after the issuance of the policy and any time prior to November 30, 1918, there was no lapse in the policy. * * * This policy is not made dependent upon the length of service in the army, and * * * if he should become totally and permanently disabled at any time during the lifetime of the policy he would be entitled to recover.

In addition, it is difficult to perceive where the refusal to give the requested instruction in this case constitutes prejudicial error when the giving of a like instruction or similar instruction in the Eliasson case was deemed not to constitute prejudicial error because immaterial. The issue in this case is whether or not the plaintiff became permanently and totally disabled on or after August 28, and before November 30, 1918. His physical condition at the time of enlistment on August 25, 1918, is clearly immaterial to the issue thus presented and it is submitted that no reversible error could be committed by refusal to give instruction concerning his condition at that time.

This case is strikingly similar to the case of *James W. Jordan* v. *United States,* No. 5916, decided by this Court on November 12, 1929. Judge Rudkin, writing the opinion, said:

> The court instructed the jury, in effect (as the Trial Court in the Brandaw case did), that if the plaintiff suffered from epilepsy and was totally and permanently disabled between the date of his entry into the military service of the United States and the dates of issuance of the policies, their verdict should be for the defendant. The jury returned a general verdict for the defendant, accompanied by two special interrogatories, finding that the plaintiff was permanently and totally disabled from epilepsy between

the date of his entry into the military service of the United States and the date of the two contracts of insurance. Upon the general verdict and the special findings, a judgment was entered in favor of the defendant.

"If the appellant became totally and permanently disabled after his entry into the military service of the United States and before applications for the policies in suit were made, and before the policies issued, the charge of the court was correct, because a policy of insurance does not ordinarily cover a loss already suffered." (Citing 31 opinions Atty. Gen. 534.)

Since it is clear that the only evidence in the present case showed that Brandaw was in sound condition when he was enlisted, it logically follows that the general verdict of the jury must have been on the basis:

(1) That he was permanently and totally disabled before he applied for insurance and therefore suffered no loss under the policy, or (2) that he was not permanently and totally disabled at any time prior to November 30, 1918.

II

On the question of timeliness of plaintiff's exception to the Court's refusal to request as instructed we respectfully urge upon the Court that the record seems plain that no exception was taken by the plaintiff until after the jury retired, as ap-

pears from the following colloquy between plaintiff's counsel and the court (R. 23, 24):

> Whereupon, *after the jury had retired,* the following proceedings were had:
>
> Mr. GREEN. May it please the court, will the court grant me an exception to the refusal of the court to give requested instruction No. 7 in regard to the presumption?
>
> The COURT. Yes; I noted an exception.
>
> Mr. GREEN. Now, may it please the court, there is one other question.
>
> The COURT (interrupting). I might say in reference to that exception—I don't know whether it is available *because it was not taken until after the jury retired.*
>
> Mr. GREEN. I thought it was the practice not to make the exceptions in the presence of the jury.
>
> The COURT. Not in this court. (Italics ours.)

It is, therefore, respectfully submitted that upon this state of the record the question as to the correctness or incorrectness of the Trial Court's refusal to give the requested instruction has not been properly presented on appeal for consideration before this Court under the authority of the case of *Brevard Tannin Co.* v. *J. F. Mosser Co.,* 288 Fed. 725, and other cases cited in the Government's brief.

For the reasons stated, the defendant in error respectfully prays this Court to grant a rehearing of the cause, and to the end thereof restore the same

to the calendar for oral argument at such time and under such terms and conditions as to the Court may seem fit.

Respectfully submitted.

GEORGE NEUNER,
United States Attorney.

JAMES T. BRADY,
Attorney, U. S. Veterans' Bureau.

I certify that the foregoing petition is, in my opinion, well founded, and is not made for the purposes of delay.

GEORGE NEUNER,
United States Attorney.

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